

## **EMPLOYMENT DEVELOPMENT DEPARTMENT**

### **Amendment of Sections 3254-3, 3258-1, 3258-2, 3260-1, 3262-1, and Adoption of Sections 3261-1 and 3262-2 of Title 22, California Code of Regulations**

#### **VOLUNTARY PLANS – SB 467**

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#### **§ 3254-3. Termination of Coverage Under a Voluntary Plan.**

(a) Coverage under a voluntary plan may be terminated prior to commencement of a period of disability by any one of the following conditions:

(1) Termination of the voluntary plan by the director in accordance with the provisions of Section 3262 of the code and Section 3262-1 of these regulations.

(2) Withdrawal of the voluntary plan by the employer or a majority of its employees in accordance with the provisions of subdivision (g) of Section 3254 or subdivision (g) of Section 3255 of the code.

(3) Cancellation of the voluntary plan by an admitted disability insurer in accordance with the provisions of Section 3262-2 of these regulations.

(4) Withdrawal from the voluntary plan by a covered employee in accordance with the provisions of subdivision (g) of Section 3254-2 of these regulations or subdivision (a) of Section 3271 of the code and subdivision (b) of Section 3271-1 of these regulations.

(5) Termination of the employer-employee relationship. Except when subdivision (b) of this section applies, "termination of the employer-employee relationship" means that employment ceases with no mutual expectation or intention to continue the working relationship. Reasons for termination of the employer-employee relationship include, but are not limited to, separation, dismissal, resignation, and retirement.

EXAMPLE 1. Separation. A, an operating engineer, leaves work at the close of the shift on Friday when A and other members of A's crew are informed by the employer that their services are no longer needed because the job is in the course of being completed. For any new projects the employer will request a general union dispatch of union members. A is paid in full on that day. On Sunday A is in an automobile accident. A files a disability claim with the voluntary plan.

A's disability and inability to perform regular or customary work is not in dispute. However, the employer had terminated the employment relationship with

A prior to commencement of the period of disability, and disability benefits are payable from the Disability Fund rather than under the voluntary plan.

EXAMPLE 2. Dismissal. Given a written notice of dismissal in the middle of B's shift, effective immediately, because B objected to performing a "rush job" and because B had consistently taken too much time to perform assignments. B's request to retain B's job is rejected. On the next day B files a disability claim with the voluntary plan for indefinite complaints and nervous instability.

The employer terminated the employment relationship with B on a day when B would have continued to perform regular or customary work had B not been dismissed. If B establishes a disability and inability to perform regular or customary work, disability benefits are payable from the Disability Fund rather than under the voluntary plan.

EXAMPLE 3. Resignation. C is employed full time and also enrolled in several courses at a local university. C voluntarily resigns C's employment to concentrate on C's education with a full program of study. During the period of employment C was under frequent medical treatment for infectious eczematoid dermatitis but lost no time from work. Within two weeks of terminating employment C's condition worsens and C withdraws from school for intensive treatment in a hospital. C files a disability claim with the voluntary plan.

C's disability and inability to perform regular or customary work is not in dispute. However, C voluntarily terminated the employment relationship with the voluntary plan employer prior to commencement of the period of disability. If C can establish an attachment to the labor market, disability benefits are payable from the Disability Fund rather than under the voluntary plan.

EXAMPLE 4. Retirement. D, a janitor, seventy years of age, retires because D wishes to take a well-earned rest and because D feels the job is getting too heavy for D's age. D has not seen a doctor for approximately one year prior to the termination of employment. D plans to seek lighter work. Within two weeks of terminating employment D contracts pneumonia and files a disability claim with the voluntary plan.

D's disability and inability to perform regular or customary work is not in dispute. However, D voluntarily retired and terminated the employment relationship prior to commencement of the period of disability. If D can establish that D remains attached to the labor market, disability benefits are payable from the Disability Fund rather than under the voluntary plan.

(6) Leave of absence without pay or a layoff without pay if the leave or layoff extends for a period of fifteen (15) full days before the period of disability commences. Except when subdivision (b) of this section applies, "leave of absence" and "layoff" mean that something other than a permanent termination of the employment relationship is indicated at the time an individual's work comes to an end, or the employment ceases because of factors beyond the employee's or the employer's control. A leave of absence from work is granted by the employer for many reasons. Reasons for a layoff include the following:

(A) Temporary disciplinary action.

(B) Lack of work. The term "lack of work" indicates termination of employment because the commodity or activity provided by the business is no

longer in sufficient demand to require the services of the individual, however the individual would be subject to recall if more work developed; or because an on-call employee who accepts temporary assignments is laid off at the completion of an assignment with the expectation that another assignment will be provided in the future.

(C) Material shortage. The term "material shortage" indicates the lack of some component necessary to make a final product, i.e., in a steel mill--lack of coal, ore, etc.; in a cannery--lack of the products being canned, cans, etc.; in the automotive industry--lack of steel, parts, etc.

(D) Season of activity ends. The term "season of activity ends" indicates termination of employment because of the seasonal nature of the work, i.e., lumbering ceases because of weather; canning stops because crop not in season; fishing stops because the fish run ends; track closes because racing seasons ends.

EXAMPLE 1. Leave of Absence. A is granted an indeterminate leave of absence without pay in order to assist in the care of a sick daughter and because A is "worn out" caring for the daughter while also working. On the fifteenth day following the last day of work A is severely injured in an automobile accident and files a disability claim with the voluntary plan.

A day is defined in Section 125-1 of these regulations as the 24-hour period beginning at midnight and ending the following midnight. Therefore, a disability which occurs on the 15th day after leaving work is not one that occurred 15 full days after the last day worked. Disability benefits are payable under the voluntary plan.

EXAMPLE 2. Layoff Due to Lack of Work. B, an out-of-doors pipe tester, is laid off without pay because work was slow on account of the weather. B checks with the employer several times in the following week but no work was available. Subsequently B is terminated as of the last day worked when B does not contact the employer for thirty days. B files a disability claim with the voluntary plan because B was admitted to a hospital, suffering from acute alcoholism, on the fifteenth day following the last day of work.

A day is defined in Section 125-1 of these regulations as the 24-hour period beginning at midnight and ending the following midnight. Therefore, a disability which occurs on the 15th day after leaving work is not one that occurred 15 full days after the last day worked. Disability benefits are payable under the voluntary plan.

EXAMPLE 3. Layoff on On-Call Employee. C works through a temporary employment agency. For the past two years C has been working "pretty steady" on assignments provided by this agency. There have been periods of employment and indefinite periods of unemployment. C completes an assignment and is laid off without pay until such time as another assignment may be available. On the fifteenth day following the last day of work C is severely injured in a motorcycle accident and files a disability claim with the voluntary plan.

A day is defined in Section 125-1 of these regulations as the 24-hour period beginning at midnight and ending the following midnight. Therefore, a disability which occurs on the 15th day after leaving work is not one that occurred

15 full days after the last day worked. Disability benefits are payable under the voluntary plan.

EXAMPLE 4. Layoff Due to Material Shortage. D, a fish cannery worker, is laid off without pay because fishing has been poor. D is subject to recall to work at any time until the fish packing season officially ends. On the fifteenth day following the last day of work D has a congestive heart failure and files a disability claim with the voluntary plan.

A day is defined in Section 125-1 of these regulations as the 24-hour period beginning at midnight and ending the following midnight. Therefore, a disability which occurs on the 15th day after leaving work is not one that occurred 15 full days after the last day worked. Disability benefits are payable under the voluntary plan.

EXAMPLE 5. Layoff Due to End of Season. E, a laborer for a fruit packing company, is laid off without pay at the close of the season, and there will be no more work for E until the commencement of the next season in nine months. Under the collective bargaining agreement in force between E's union and the employer, E has employment rights based upon seniority. E immediately seeks other work as a laborer although employment opportunities are scarce in the small community. On the fifteenth day following the last day of work E fractures a femur and files a disability claim with the voluntary plan.

A day is defined in Section 125-1 of these regulations as the 24-hour period beginning at midnight and ending the following midnight. Therefore, a disability which occurs on the 15th day after leaving work is not one that occurred 15 full days after the last day worked. The employer-employee relationship had been merely suspended rather than terminated. Benefits are payable under the voluntary plan.

(b) Notwithstanding the provisions of subdivision (a) of this section, coverage under a voluntary plan shall not be terminated during the extended period where the employer-employee relationship is considered to be continued under any one of the following conditions:

(1) When a voluntary plan elects to extend its benefits for a specified longer period than required by subdivision (a) of this section.

(2) When a voluntary plan covered employee becomes disabled on the date coverage under the voluntary plan would otherwise be terminated. For the purposes of this subdivision, "date" means year, month and day, ending at midnight of that day. This is consistent with the definition of "day" as defined in Section 125-1 of these regulations as the 24-hour period beginning at midnight and ending the following midnight. Coverage shall not be deemed terminated at the time (hour and minute) the cessation of work occurs.

EXAMPLE 1. Disability on Voluntary Plan Termination Date. A normally works from 6:00 a.m. to 3:00 p.m. A is discharged at 9:00 a.m. because A is intoxicated. On that same day A severely injures A's back at 5:00 p.m. at home while lifting work tools from the car. A files a disability claim with the voluntary plan.

Disability benefits are payable under the voluntary plan because A became disabled before midnight on the day that the employer-employee relationship was terminated.

(3) When a covered employee is on a leave of absence or a layoff and receives wages from the voluntary plan employer allocable to days of the period of leave of absence or layoff. Coverage shall not be deemed terminated until the leave of absence without pay or the layoff without pay extends for a period of 15 full days following the last day for which wages were paid before the period of disability commences.

EXAMPLE 1. Disability Within 15 Full Days of Layoff. A is laid off when A's plant closes for the annual vacation period of two weeks, and A receives vacation pay for that fourteen-day period. On the fifteenth day following the last day of work, A is advised by the employer that there is no work available for A but that A will be called back whenever work is available. A has been under medical treatment that did not prevent A from performing A's regular and customary work. A is advised by A's physician that surgery will now be necessary, and A enters a hospital for the surgery on the twenty-ninth day following the last day of work. A files a disability claim with the voluntary plan.

A day is defined in Section 125-1 of these regulations as the 24-hour period beginning at midnight and ending the following midnight. Therefore, a disability which occurs on the 15th day after leaving work is not one that occurred 15 full days after the last day worked. Disability benefits are payable under the voluntary plan.

COMMENTS. If the employer-employee relationship has been terminated, the receipt of severance payments, earned but unpaid vacation pay or holiday pay, and earned but unpaid sick pay, paid because of termination of employment, does not extend coverage under a voluntary plan after the date of the termination (see Sections 1265, 1265.5, and 1265.7 of the code.)

(4) When a covered employee is on a leave of absence without pay or a layoff without pay and becomes disabled from one medical condition within 15 full days following the last day of work and then suffers a second or more unrelated disabling condition before a recovery from the disability for which a disability claim is initially filed with the voluntary plan. Coverage shall not be deemed terminated at any time during the uninterrupted period of disability due to overlapping disabling conditions.

EXAMPLE 1. Leave of Absence without Pay. A is granted an indeterminate leave of absence without pay because of pregnancy and A's plans for motherhood. At that time A is able to perform A's regular or customary work but on the fifteenth day following the last day of work the baby is born. A files a disability claim with the voluntary plan with a physician's certificate for a six-week postpartum period of disability. In the fifth week following the birth of the baby A suffers a gallbladder problem requiring a cholecystectomy. A's physician extends the period of disability for another six weeks.

A day is defined in Section 125-1 of these regulations as the 24-hour period beginning at midnight and ending the following midnight. Therefore, a disability which occurs on the 15th day after leaving work is not one that occurred 15 full days after the last day worked. A is eligible for disability benefits from the voluntary plan for approximately twelve weeks or until the continuous period of unemployment and disability ends (see subdivision (c) of Section 2608-1 and subdivision (d) of Section 3254-2 of these regulations).

(5) When a covered employee is terminated or laid off without pay or given a leave of absence without pay while receiving "other benefits" as that term is used in Section 2629 of the code and then suffers a second or more unrelated disabling condition for days such "other benefits" are received. Coverage shall not be deemed terminated at any time during the uninterrupted period of disability due to overlapping disabling conditions notwithstanding the fact that disability benefits may not be immediately payable under the voluntary plan.

EXAMPLE 1. Leave of Absence While Receiving Other Benefits. A receives temporary workers' compensation benefits for an industrial injury arising out of and in the course of A's employment. While still disabled, the voluntary plan employer advises A that the plant is closing immediately in the city where A resides, and there will be no more work available for A. A continues to receive workers' compensation benefits for a total of six months of benefits. Two weeks before A receives a final examination and discharge by the workers' compensation insurer's physician, A is informed by A's private physician that A should not attempt to work again because of chronic rheumatoid arthritis and heart disease. A files a disability claim with the voluntary plan.

Disability benefits are payable to A under the voluntary plan for days immediately following termination of payments of temporary workers' compensation. The voluntary plan is liable for the maximum period payable under the voluntary plan for a continuous period of unemployment and disability, although from overlapping industrial and non-industrial disabling conditions, which commenced while the voluntary plan was in effect (see subdivision (c) of Section 2608-1 and subdivision (d) of Section 3254-2 of these regulations).

(6) When a covered employee becomes disabled after leaving work due to a trade dispute. Coverage shall not be deemed terminated as long as the trade dispute is in active progress.

EXAMPLE 1. Trade Dispute. A leaves work because of a trade dispute and becomes disabled sixty days later while the trade dispute remained in active progress. A has not resigned from A's employment. A files a disability claim with the voluntary plan.

Disability benefits are payable under the voluntary plan because A became disabled while the trade dispute was in active progress. A strike or trade dispute simply suspends the employer-employee relationship and does not terminate it. The circumstances under which A left work do not constitute a leave of absence without pay or a layoff without pay.

NOTE: Authority cited: Sections 305, 306 and 2602, Unemployment Insurance Code. References: Sections 1265, 1265.5, 1265.7, 2608, 2629, 3254, 3255, 3262, and 3271, Unemployment Insurance Code.

### **§ 3258-1. Self-Insured Plans--Security.**

(a) The security required of a self-insurer shall be in the form of a cash deposit, bearer bonds issued or guaranteed by the United States of America, or issued by this State or the bond of an admitted surety insurer. The amount of the security in excess of the minimum required by the code shall be determined by the department upon the basis of the number of employees involved, the size of the pay roll, the class of risks contemplated, the financial standing of the employer and any additional factors which the department may deem proper. The department may at any time re-evaluate the amount of security to ascertain whether the amount is adequate to meet the obligations of the self-insured plan.

(b) The security provided for in this section shall be applied by the department to the payment of any unpaid obligations under the plan. Upon withdrawal of a self-insured plan pursuant to Section 3254 (g) or Section 3255 (g) of the code, or upon termination of a plan pursuant to Section 3262-1 of these regulations, the department shall retain the security theretofore deposited. Upon the expiration of all benefit claims outstanding after the lapse of six completed calendar quarters following the effective date of the withdrawal or termination of the plan, the department may collect the unpaid amount of any assessment against the employer out of the security on deposit, or may demand payment from the surety insurer. Any security remaining after payment shall be returned to the employer or his or her legal representative or his or her assignee. The surety insurer which pays the amount demanded shall thereupon be discharged of its obligation under the bond. The department may make a partial return of the security at an earlier date if it finds that the security is in excess of that required.

NOTE: Authority cited: Sections 305, 306 and 2602, Unemployment Insurance Code.  
Reference: Section 3258, Unemployment Insurance Code.

## **§ 3258-2. Letter of Credit.**

(a) An irrevocable standby letter of credit may be accepted by the Director of the Employment Development Department (Director) as all or part of the security deposit for a voluntary plan employer (employer). An irrevocable standby letter of credit is a letter of credit that represents an obligation on the part of the issuing bank to a designated beneficiary contingent upon the failure of the issuing bank's customer to perform under the terms of the underlying contract with the beneficiary. The letter of credit obligates the bank to guarantee or stand as surety for the benefit of a third party. The employer shall be responsible to accurately complete and sign a form, the same or similar to, the "Model, Letter of Credit", herein incorporated by reference.

(b) Irrevocable letters of credit shall be issued by and payable at any branch of the issuing bank or savings institution in the continental United States, Alaska or Hawaii. The issuing bank or savings institution may be:

- (1) A State of California chartered bank or savings institution; or
- (2) A federally chartered bank or savings institution; or
- (3) Any other foreign or domestic bank or savings institution; or
- (4) A group (syndication) of domestic or foreign banks or savings

institutions.

(c) The Director shall provide a standard format and language in a document titled "Model, Letter of Credit" incorporated by reference and referred to above in subsection (a) that will meet the requirements for acceptance by the Department. The letter of credit shall include, but not be limited to, the following provisions:

(1) The letter of credit will be automatically extended without amendment for an additional one year from the expiration date or any subsequent expiration date unless at least 60 days before the expiration date, the Director is notified in writing by the bank or savings institution that the letter of credit will not be renewed.

(2) The letter of credit can be called by the Department if any of the following events occur. The employer:

(A) Fails to pay its voluntary plan liabilities;

(B) Files bankruptcy;

(C) Fails to provide proof of renewal or acceptable substitute security with the Employment Development Department by 30 days prior to the expiration date of the letter of credit;

(D) Fails to renew or substitute acceptable security for the six quarter period following the withdrawal of a self-insured plan pursuant to Section 3254 (g) or Section 3255 (g) of the code, or upon termination of a plan pursuant to Section 3262-1 of these regulations.

(3) The letter of credit is not subject to any qualification or condition by the issuing or confirming bank or savings institution and the bank or savings institution's individual obligation is in no way contingent upon reimbursement.

(4) Payment of any amount under the letter of credit shall be made only by wire transfer in the name of "The Employment Development Department in



Trust for (the legal name of the employer)" to an account of the State Treasurer, State of California, at a designated bank.

(5) All letters of credit shall include a statement that if legal proceedings are initiated by any party with respect to the payment of any letter of credit, it is agreed that such proceedings shall be subject to the jurisdiction of California courts and administrative agencies and subject to California law.

(6) Letters of credit shall be subject to the Uniform Customs and Practice for Documentary Credits, 1993 Revision ICC Publication No. 500, herein incorporated by reference and a reference to this publication will be included within the text of the letter of credit.

(7) Wire transfer fees and discrepancy fees, if any, shall be payable by the employer.

(d) A syndicated letter of credit shall include all the language of the single bank issued letter of credit and, in addition:

(1) Authorize all demands for payment to be presented at a designated branch ("agent bank") of one of the participating banks or savings institutions;

(2) Include a draft to be presented for payment of all or part of the credit available under the letter of credit;

(3) Permit any participating bank's portion of the total credit available to be drawn upon if the participating bank's credit rating falls below the acceptable credit rating level specified in subsection (e) of this section; and

(4) State that the obligations of the banks or savings institutions issuing a syndicated letter of credit are several and not joint, and neither the agent bank or savings institution or any other participating bank or savings institution shall be responsible for or otherwise liable for the failure of any other participating bank or savings institution to perform its obligations under the syndicated letter of credit. The failure of any participating bank or savings institution to perform its obligations under the syndicated letter of credit shall also not relieve any other participating bank or savings institution of its obligations under the syndicated letter of credit.

(e) The issuing bank(s) or savings institution(s) or the parent holding corporation of an unrated bank or savings institution issuing a letter of credit shall have at the time of issuance of the letter of credit an acceptable credit rating as set forth below:

(1) An "Aaa", "Aa" or "A" long term certificate of deposit (CD) rating for the bank or savings institution in the current monthly edition of "Moody's Statistical Handbook" prepared by Moody's Investors Service, Inc., New York; or

(2) An "AAA", "AA" or "A" long term certificate of deposit (CD) rating for the bank or savings institution in the current quarterly edition or monthly supplement of "Financial Institution Ratings" prepared by Standard & Poors Corporation, New York; or

(3) An "AAA", "AA+" or "AA" credit quality rating for the issuing financial institution along with a CD/Debt Credit Limit Code above the dollar amount of the letter of credit as well as a Credit Limit Maturity Code of "a, b, c, or d" in the current annual edition of "GFI Credit Ratings", or the latest monthly "GFI Bank Letter" supplement thereto.

(4) Federally chartered instrumentalities of the United States operating under authority of the Farm Credit Act of 1971, as amended are not rated, but are acceptable.

(f) A letter of credit issued by a bank or savings institution or syndication of banks or savings institutions that does not meet the credit rating set forth in subsection (e) at the time of issuance shall be accepted by the Director with a confirming letter of credit issued by a bank or savings institution meeting the criteria of subsection (e). The confirming letter of credit shall state that the confirming bank or savings institution is primarily obligated to pay on demand the full amount of the letter of credit regardless of reimbursement from the bank or savings institution whose letter of credit is being confirmed.

Note: Advising letters of credit shall not be accepted in lieu of the confirmation requirement for the letter of credit bank with an unacceptable credit rating.

(g) If a bank or savings institution's rating subsequent to the issuance of the letter of credit falls below the acceptance rating level as set forth in subsection (e), the Director shall, within 60 days of the publication of the lower credit rating, require the employer to:

(1) Replace the letter of credit with a new letter of credit issued by a bank or savings institution with an acceptable credit rating; or

(2) Confirm the letter of credit by a bank or savings institution with an acceptable rating.

Note: At the end of 60 days, the Director shall draw upon the letter of credit bank's share of participation in the syndication if the affected letter of credit bank's portion of syndicated letter of credit has not been replaced or confirmed.

NOTE: Authority cited: Sections 305, 306 and 2602, Unemployment Insurance Code. Reference: Section 3258, Unemployment Insurance Code; Statutes of 1994, chapter 960, section 4, AB 3320.

## **§ 3260-1. Disposition of Excess Employee Contributions by Voluntary Plans.**

(a) The amounts deducted by an employer from the wages of his or her employees as their contributions under a voluntary plan are trust funds. They may be used only for the purpose of providing benefits to the employee group covered by the voluntary plan and paying any assessments made by the department under the code and this part in connection with the voluntary plan. No part of such employee contributions or income resulting therefrom may be diverted to the employer's own use or profit.

In the case of a plan insured by an admitted disability insurer, any accumulated excess of such employee contributions over and above the net cost of premiums, after premium dividends or experience rate credits, and assessments made by the department in connection with the plan, must inure to the benefit of the employee group covered by the plan commensurate with their contributions or in an otherwise fair and equitable manner.

In the case of a self-insured plan, any accumulated excess of such employee contributions over and above the amount needed to provide benefits, including a reasonable reserve for future claims, assessments made by the department in connection with the plan, and direct costs of administration of the voluntary plan, must inure to the benefit of the employee group covered by the plan commensurate with their contributions or in an otherwise fair and equitable manner.

Methods of using excess voluntary plan funds which are commensurate with contributions, or fair and equitable, would include but is not limited to the following examples, including percentages and amounts contained therein.

### **EXAMPLE 1**

All employees contribute at a rate of 1.0%. The excess voluntary plan funds are used to reduce that rate to .7% for all employees.

### **EXAMPLE 2**

Two classes of employees are distinguished. Class A contributes at a rate of 1.0%. Class B contributes at a rate of .8%. A rate reduction of 25% for each class would be allowable, resulting in Class A contributing at .75% and Class B at .6%. It would not be allowable to reduce the rate by an equal amount, such as .2%, for each class. That would yield a .8% rate, or 20% contribution reduction for Class A and a .6% rate, or 25% contribution reduction for Class B.

### **EXAMPLE 3**

During a one-year period, an excess of \$50,000 accumulates in a plan in which contributions totaled \$100,000. A refund to each employee of 50% of the amount he/she contributed in that year would be allowable.

### **EXAMPLE 4**

All employees are paid a benefit equal to 55% of their current wage to a weekly maximum of \$400. To distribute excess funds, a 10% increase in the benefits that each employee receives would be allowable. It would also be allowable to increase the benefit calculation to 65% of current wage, and increase the weekly maximum of \$473 for each employee.

#### EXAMPLE 5

Two classes of employees, who contribute at the same rate, are distinguished. Class A, those employees with more than five years of service, receive a regular benefit equal to 65% of current wage with no weekly maximum. Class B, those employees with less than five years of service, receive a regular benefit equal to 55% of current wage with no weekly maximum. Using excess contributions to provide a 10% increase for each class would be allowable, resulting in Class A now receiving 71.5% of current wage and Class B now receiving 60.5% of current wage.

#### COMMENT:

In a situation where all employees receive a regular benefit of 60% of current wage with no weekly maximum, it would not be allowable to use excess contributions to add \$20 per week to each benefit amount. Under this method, employees whose regular benefit is \$50 would then receive \$70 per week, realizing a 40% benefit increase. Employees whose regular benefit is \$500 would then receive \$520, realizing only a 4% increase. The disparity between the percentages of benefit increase is neither commensurate with contributions nor fair and equitable.

#### EXAMPLE 6

A voluntary plan, which has been operating for six years, began accumulating an excess beginning in the fourth year of operation. Employees have always contributed at the same rate. A health insurance policy covers all employees at a cost of \$140 per month per person, shared equally between the employer and the employee. The employer proposes to use excess voluntary plan contributions to defray part of the employee cost for the health care policy for a one-year period. The proposal relieves each employee of his or her obligation at a rate of \$20 per month for each full calendar year of service during the three years that the excess accumulated. Service for any partial calendar year during the same three-year period would reduce the employee's obligation by \$10 per month. With the consent of the majority of the employees, this would be allowable.

#### EXAMPLE 7

Two classes of employees are distinguished. The voluntary plan contribution total for each class is determined for the previous year by adding individual contributions as reflected on the W2 forms. Class A, employees who have more than two years with the company, will be provided with life insurance, using excess voluntary plan contributions. Class B, employees who have less than two years with the company, will receive a rebate from the excess voluntary plan contributions. If the amount of excess used for the life insurance and for the rebate is proportionate to the total contributions of each class, as determined by the W2 forms, this use would be allowable.

#### EXAMPLE 8

Two classes of employees are distinguished. The employer keeps separate records on income and expenses for each class. After disbursements in a given year, the amount of excess remaining from Class A contributions is \$30,000. After disbursement in the same year, there is no excess remaining from

Class B contributions. It is allowable to use the \$30,000 excess to benefit only Class A employees.

An employer may use any one of the following methods, or combination thereof, to dispose of any such accumulated excess, provided that method No. 4 may be used only upon the consent of a majority of the employees covered by the plan at the time of the disposition. Consent of the majority of the employees at the time of disposition shall mean that the employer shall secure employee consent within 60 days prior to the date the disposition of funds begins.

(1) Reduce or waive payroll deductions for a sufficient period to dispose of the excess.

(2) Refund the excess to the employees covered by the voluntary plan in a fair and equitable manner as approved by the department.

(3) Increase disability benefits under the plan either temporarily or permanently.

(4) Apply such excess to the purchase of other employee benefits for the employees covered by the voluntary plan such as group life, hospital, or medical insurance.

(b) In the case where the employer advances a portion of the cost of benefits under a voluntary plan (including any benefits in addition to wage loss indemnity which may be "packaged" therewith), in the absence of any representation or agreement to share a definite portion of such costs, the amount of any premium dividend, experience rate credit or other excess available for distribution may be applied by the employer to offset the amount he or she has advanced and the remainder applied to the benefit of such employee group as herein above provided. If, however, the employer by representation or agreement has undertaken to bear a certain share of the cost of the plan, the employer may recover from such premium dividend, experience rate credit or other excess available for distribution only such portion thereof as his or her share of the original contribution bore to the total contributions, and the remainder must be applied to the benefit of such employee group as herein above provided.

(c) If the amount of excess employee contributions held by an employer at any one time is so small that any of the foregoing methods of disposition is impracticable, the amount may be carried over to a future period to add to any additional accruals until there is a sufficient amount to permit the use of any of the foregoing methods.

(d) A self-insurer may, with prior approval of the department, invest trust funds of the self-insured plan in securities which a savings bank may legally purchase under Chapter 9 of Division 1 of the Financial Code or which a commercial bank may legally purchase under Article 4 of Chapter 10 of Division 1 of the Financial Code.

(e) Failure to comply with the provisions of this section shall be good cause for termination of a voluntary plan.

NOTE: Authority cited: Sections 305 and 306, Unemployment Insurance Code.  
Reference: Sections 3260, 3260.5, and 3261, Unemployment Insurance Code.

### **§ 3261-1. Maintenance of Excess Employee Contributions by Voluntary Plans.**

(a) All employee contributions received by an employer under an approved voluntary plan and income arising from the employee contributions are trust funds. These trust funds are not part of the employer's assets and must be identified as an asset belonging to the employees covered under the voluntary plan. The employee trust funds shall be maintained in a financial institution as defined in § 4981(a)(2) of the California Financial Code, in an account opened in the name of the voluntary plan employer; the account must show the monies deposited as, "Employee CUIC 3261 Trust Monies." The term financial institution means a depository institution that can be any one of the following:

(1) Any insured bank as defined in § 3 of the Federal Deposit Insurance Act (12 U.S.C. § 1811 et seq.) or any bank which is eligible to make application to become an insured bank under § 5 of the act.

(2) A mutual savings bank as defined in § 3 of the Federal Deposit Insurance Act (12 U.S.C. § 1811 et seq.) or any bank which is eligible to make application to become an insured bank under § 5 of the act.

(3) A savings bank as defined in § 3 of the Federal Deposit Insurance Act (12 U.S.C. § 1811 et seq.) or any bank which is eligible to make application to become an insured bank under § 5 of the act.

(4) An insured credit union as defined in § 101 of the Federal Credit Union Act (12 U.S.C. § 1751 et seq.) or any credit union which is eligible to make applications to become an insured credit union pursuant to § 201 of that act.

(5) Any member as defined in § 2 of the Federal Home Loan Bank Act (12 U.S.C. § 1421 et seq.).

(6) Any savings association as defined in § 3 of the Federal Deposit Insurance Act (12 U.S.C. § 1811, et seq.) which is an insured depository institution as defined in the act or is eligible to apply to become an insured depository institution under the act.

An insured voluntary plan employer shall only transmit to the admitted disability insurer voluntary plan trust funds, including earned interest or income, in amounts necessary to pay the premiums charged by the admitted disability insurer. Any accumulated excess employee contributions over and above the net cost of premiums, after premium dividends or experience rate credit shall be maintained in a depository institution.

(b) All employee contributions received by an employer under an approved voluntary plan shall be deposited in the account described in Section 3261-1 (a) by the same date that employee federal personal income tax withholdings are due.

NOTE: Authority cited: Sections 305, 306, and 2602, Unemployment Insurance Code. Reference: Section 3261, Unemployment Insurance Code.

§ 3262-1. Termination of a Voluntary Plan.

(a) The Director of Employment Development may terminate any voluntary plan if there has been a failure to comply with the terms and conditions of the plan such as substantial failure to pay benefits promptly when due; or, in the case of an insured plan, upon notification of the termination of the policy of insurance; or that fewer than a majority of the admissible employees remain covered by the plan; or for other good cause. The notice of intention to terminate a plan shall include a statement of the right to appeal to the Appeals Board. The notice shall state the effective date and the reason for the termination. Contributions with respect to wages paid on or after the date of termination shall be paid to the Disability Fund in accordance with the provisions of Sections 2901-2903 of the code.

(b) All employee monies maintained in the account described in Section 3261-1 of these regulations and, in addition, monies paid by the employer, money owed to the voluntary plan by the employer, but not yet paid to the plan, and any interest accrued on all these monies, shall be remitted to the department on the effective date of the termination of the voluntary plan as provided in subdivision (a). The monies received by the department will be deposited into the Disability Fund.

(c) The claim documents and payment records of individuals whose payments were affected by subdivision (b) shall be forwarded to the department on the effective date of the termination of the voluntary plan.

(d) Disability benefits, with respect to disabilities which commenced prior to the termination date for which proper payment had not been made under the voluntary plan, shall be paid from the Disability Fund in accordance with Part 2 (commencing with Section 2625) of the code to otherwise eligible individuals previously covered by the plan. These payments shall be recovered from the monies remitted to the department in accordance with subdivision (b), Section 3262 of the code, or by assessments as provided in Sections 1126-1136 of the code.

NOTE: Authority cited: Sections 305, 306 and 2602, Unemployment Insurance Code.  
Reference: Section 3262, Unemployment Insurance Code.

**§ 3262-2. Appeals Board Decision of Department Termination of Voluntary Plan.**

(a) When the Appeals Board decision is sent to an appellant from an appeal filed in accordance with subdivision (e), Section 3262 of the code, one of the following actions shall be implemented:

(1) If the Appeals Board affirms the termination of the voluntary plan, the department shall continue the payments described in subdivision (d) of Section 3262-1 of these regulations, or

(2) If the Appeals Board reverses the department's termination of the voluntary plan, the department will return the claim documents described in subdivision (c) of Section 3262-1 of these regulations to the employer. The department will provide the employer, employee group, or insurer with a statement describing the payments issued under subdivision (d) of Section 3262-1 of these regulations. The department's payments shall be recovered from the monies remitted to the department in accordance with subdivision (b), Section 3262 of the code. All remaining monies, if any, shall be returned to the employer and any employee monies shall be re-deposited into the account created in accordance with Section 3261-1 of these regulations.

(b) If the department is unable to recover the full amount of payments issued under subdivision (d) of Section 3262-1 of these regulations from the monies remitted to the department, recovery will be sought against the employer or insurer. The Director of Employment Development shall assess the employer or insurer for payments that have not been recovered from the employer or insurer.

NOTE: Authority cited: Sections 301, 305, 306, and 2602, Unemployment Insurance Code. Reference: Section 3262, Unemployment Insurance Code.

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